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Salt Lake City Corporation v. All Taxpayers,
Property Owners, And Citizens Of Salt Lake City,
Utah, And Mark Shurtleff, Jordan River Restoration
Network, Danny Potts, And Nancy L. Saxton, Hans
Ehrbar, M. Ray Kingston, Lucy Knorr, And
Raymond W. Wheeler, And Lucy Knorr : Reply
Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY CORPORATION,
Petitioner/Appellee,

v.

All taxpayers, property owners, and
citizens of Salt Lake City, Utah, and
MARK SHURTLEFF,
Defendants,

JORDAN RIVER RESTORATION
NETWORK, DANNY POTTS, and
NANCY L. SAXTON,
Defendants/Appellants,

M. RAY KINGSTON, RAYMOND W.
WHEELER, HANS EHRBAR, AND
LUCY KNORR,
Pro-se Defendants/Appellants

Case No. 20110316 - SC

Consolidated No. 20110582 - SC

REPLY BRIEF OF JRRN APPELLANTS

Appeal from District Court Case Number 110901081, in the Third Judicial District Court,
Salt Lake County, Honorable Robert K. Hilder Presiding.

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INTRODUCTION

A bond validation proceeding involves an implicit bargain between the legislature and municipalities. By providing for a bond validation proceeding, the legislature allows an expedited process that provides finality to any bond issuance. In exchange, municipalities are required to establish that they have fully and completely complied with the Bonding Act and any other applicable laws. The bond validation proceeding is not intended to be a “rubber stamp” that allows a municipality unlimited discretion and the ability to circumvent or evade all meaningful judicial review. Yet that is exactly how the City has interpreted the Bond Validation Act and the Bonding Act.

In its brief, the City has not only argued that notice of the bond validation proceeding is not a due process requirement, but that the notice requirement of the Bond Validation Act is a technical one that can be fulfilled by placing notice in any newspaper printed within the municipality, regardless of whether the newspaper is read by the citizens of the municipality. The City claims that a bond may be validated even if the statutorily required public hearing has not yet been held because public input can still be taken before the bond is actually issued. It has interpreted the Bond Validation Act as permitting it to modify or otherwise amend its bond authorization and offering after the bond has been validated. And finally, it claims almost unlimited discretion to alter the scope of a project funded by bonds. The City’s extreme position cannot be correct. If it were, the procedural safeguards in the Bond Validation Act and the Bonding Act would be eviscerated and voters would be denied any meaningful way to enforce their rights

under the bonding acts and due process. In addition, as long as representations in election brochures and other public materials were not intentionally misleading, municipalities would have no incentive to ensure that the representations were well researched or practical. As a result, prudence and common sense require that the rights of voters be safeguarded through a strict application of the procedural requirements and legal safeguards espoused by the bonding acts.

First, both due process and the Bond Validation Act require that taxpayers be provided adequate notice of any bond validation proceeding. Validating a bond issuance prohibits a taxpayer from challenging any deficiencies in a municipality's compliance with the law. If notice is not properly given, a municipality can evade strict scrutiny or any real challenge to validation of its bond – after all, a party who fails to attend a bond validation proceeding is prohibited from filing an appeal or a collateral attack. In this case, publication of notice in the Intermountain Commercial Record (the “IRC”) not only failed to comply with the Bond Validation Act, it was not even the means most reasonably calculated to apprise interested parties of the proceedings. On this basis alone, the district court's order should be vacated and this case remanded for a new validation proceeding after proper notice has been given.

Second, validation proceedings are ripe for abuse if they can be used to avoid the procedural requirements of the Bonding Act or insulate a bond from challenge before it is really finalized. Yet that is exactly what the City wants when it argues that the procedural requirements of the Bonding Act can be fulfilled or a bond resolution

modified after the bond issuance is validated. Under the implicit bargain of the Bond Validation Act, all of the requirements of the Bonding Act must be complied with before a bond may be authorized and validated. And the resolution authorizing issuance of a bond cannot be subject to modification after the bond has been validated. In this case, because the City as not fulfilled the public hearing requirement and has admitted that its bond resolution was not final, the district court's order must be vacated.

Lastly, the City's discretion to change the scope of its project is not and cannot be unlimited. At some point, even if it hews to the same general purpose presented to the voters, a project becomes so materially different that it is no longer the project presented to and approved by the voters during the bond election. In this case, that point has been reached – the project that the City now seeks to issue bonds for is less than half the scope of the project that voters were promised. As a result, the district court's order must be vacated.

ARGUMENT

- I. The district court violated JRRN's due process rights when it published notice in a newspaper with at least 200 subscribers statewide and an unknown circulation in the city.**

The district court's order should be vacated because it was entered in violation of the Bond Validation Act's notice requirements and JRRN's due process rights.¹ Specifically, the district court never obtained personal jurisdiction over JRRN because publication of notice of the bond validation hearing in the Intermountain Commercial Record, a trade publication that is only known to have a daily circulation of 200 subscribers, did not meet the requirements of the Bond Validation Act and was not reasonably calculated to apprise the approximately 180,000 citizens of Salt Lake City of the action. A court cannot enter a binding judgment against an individual unless it has first obtained personal jurisdiction. See Carlson v. Bos, 740 P.2d 1269, 1271 (Utah 1987)

¹ The City has claimed that JRRN failed to preserve and/or waived this argument at the Hearing. However, this very same argument was raised by the City at the Hearing and explicitly rejected by the district court. Specifically, the district court held that:

You're here today and the first thing you did was raise the issue of process. You're entitled to do that. So you didn't waive any defenses. I'm overruling your objection. I think if it was a 12(b) motion, probably a 12(b)(4), maybe a 12(b)(5), but if it was either one, denying it would simply result in you having an appealable issue, should it ever get to that point. You have that issue. But now you're here because I've said you should be here and I've said process is sufficient. But I don't believe you've waived under 12(h) which it might have been in a circumstance where you were required to file an answer or a motion ... So my view is that you – you haven't lost any rights and this is an issue you can raise at an appropriate time, but I think we need to go forward.

See Hr'g Tr. 49-50. The City has not appealed this aspect of the district court's ruling. As a result, JRRN's right to raise this issue on appeal was explicitly preserved in the district court.

(“[s]ervice of process implements the procedural due process requirement that a defendant be informed of pending legal action and be provided with an opportunity to defend against the action”). Moreover, “lack of [personal jurisdiction] is fatal to a court's authority to decide a case with respect to a particular litigant.” Jackson Const. Co., Inc. v. Marrs, 2004 UT 89, ¶8, 100 P.3d 1211 (Utah 2004).

In addressing this issue, the City has adopted the extreme position that “[b]ecause the right to contest a bond in a bond validation hearing does not implicate a liberty or property interest, notice is not required to meet due process.” (Appellee Br. at 41). However, validation of the bond will result in increased property taxes for JRRN, deprive JRRN of its right to challenge the bond in court, and result in the entry of a permanent injunction against JRRN that prevents it from contesting the validity of the bond or any other matter adjudicated in the bond validation proceedings. Therefore, because the bond hearing validates the City’s attempt to levy personal funds, the property owners of Salt Lake City are entitled to full due process and their day in court. See Richards v. Jefferson County, 517 U.S. 793, 803 (1996). See also Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 486 (1923) (holding that the interest of a taxpayer of a municipality in the application of levied moneys is direct and immediate).

Indeed, other jurisdictions considering due process in the context of bond validation hearings have almost universally found a constitutionally protected interest that requires the creation of personal jurisdiction. For example, in Castevens v. Stanly County, 191 S.E. 739, 745 (N.C. 1937), the Supreme Court of North Carolina held that

“[n]o decree or judgment adverse to [a owner of taxable property or a citizen]’s rights can be rendered in an action instituted and prosecuted in accordance with the provisions of [a bond validation statute], until every taxpayer and citizen of the unit has been lawfully served with summons, and until he has had ample opportunity to appear, and file such pleadings as he may wish.” (emphasis added). The Catstevens decision further notes that the right to service is a constitutional one. Id. See also City of Sacramento v. Drew, 255 Cal. Rptr. 704, 2207 Cal.App.3d 1287, 1304-05 (Cal. Ct. App. 1989) (holding that legal intervention in a validation action “enforces an important public right” because “[i]mposition of an unlawful levy is a species of taxation without representation”); In re Validation of \$7,800,000 Combined Utility System Revenue Bond, Gautier Utility Dist., Jackson County, 465 So.2d 1003, 1008 (Miss. 1985) (holding that a citizen has a due process right “of access to a judicial forum to present with respect to the bond issue any objection based in principle as distinguished from policy, and there to raise the question of whether the political subdivision has exceeded the substantive limitations upon its legislative power”). In contrast, the sole case cited by the City in support of its position, Denham Springs Economic Development Dist. v. All Taxpayers, Property Owners and Citizens of Denham Springs Economic Development Dist., 945 So.2d 665 (La. 2006) is easily distinguished. Denham Springs involved bonds issued by a specially created economic development district that were not to be paid back through increased taxation. 945 So.2d at 677-78. Instead, the bonds were to be paid back under a cooperative endeavor agreement that involved re-dedication of a small percentage of the existing

sales and use taxes of several different municipal and state actors. Id. Thus the Denham Springs court held that “the right to challenge the legality of the cooperative endeavor agreement” did not involve a constitutionally protected liberty or property interest because the cooperative endeavor agreement was “a public action that only has a indirect impact on [the taxpayers] interests.” Id. at 683-84 (emphasis added). As a result, the circumstances and holding in Denham Springs have no bearing on this case.

A. The district court failed to fulfill the notice requirements under the Utah Bonding Act because the ICR’s readership in Salt Lake City is unknown.

The district court’s order must be vacated because the Bond Validation Act’s notice requirement was not fulfilled. The Bond Validation Act requires that the district court publish notice of the hearing “in a newspaper published or of general circulation within the boundaries of the public body.” Utah Code Ann. §11-30-5(a)(i) (emphasis added). In this case, no evidence was presented regarding the ICR’s circulation in Salt Lake City and the City has conceded that there is no evidence that the IRC had at least 200 subscribers in Salt Lake City. (Appellee Br. at 37). Instead, the City argues that notice in the IRC meets the requirements of the Bond Validation Act because the IRC is published in Salt Lake City. Id. However, no evidence was presented at the hearing regarding where the IRC is published or the meaning of this term.²

² The City cites to the ICR’s webpage regarding its circulation in Salt Lake County as evidence of where the ICR is published. However, the webpage does not contain any mention of where the ICR is published. (App. Appx. 266.)

Furthermore, the City has interpreted “published” as meaning printed within the municipality. However, such an interpretation of the Bond Validation Act’s notice requirement renders it both nonsensical and unconstitutional on its face. Under the City’s interpretation, placing notice in a newspaper that is published in Salt Lake City but has no subscribers or readership within the municipality would fulfill the notice requirement. For example, a newspaper that only addresses topics relevant to Provo, Utah, is only circulated in Provo, Utah, and is only subscribed to by residents of Provo, Utah, would still fulfill the notice requirements for a Salt Lake City bond if its printing presses were located in Salt Lake City. However, publication of notice in such a newspaper would, in reality, deprive the residents of Salt Lake City of any notice of the proceedings.

In addition, the City’s interpretation of “published” frustrates the legislature’s intent that the notice requirement comply with Utah law on personal jurisdiction. This intent is expressed in the second part of the notice provision, which states that “if the public body has no defined boundaries or there is no newspaper published or of general circulation within the defined boundaries, [notice shall be published in] a newspaper reasonably calculated to notify all parties, which has been approved by the court.” Utah Code Ann. §11-30-5(a)(ii) (emphasis added). This provision virtually mirrors the language used by this Court in Jackson Const. Co., Inc. v. Marrs, 2004 UT 89, ¶22, 100 P.3d 1211 (Utah 2004), holding that once service by publication is authorized, it must be “reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable.”

As a result, the notice requirements better harmonizes with the legislature's intent if "published" is interpreted as meaning "to distribute copies (of a work) to the public." See Black's Law Dictionary, Abridged 999 (7th Ed. 2000). And, in order to avoid redundancy or rendering the alternate requirement of general circulation meaningless, the form of distribution intended by "published" in the context of the notice requirement would be distribution to non-subscribers. In other words, in order to be "published" within the municipality, a newspaper must be available at newsstand and other retail locations within the municipality. And, as a matter of practicality, a newspaper need a large non-subscription circulation in order to maintain its newsstand distribution network, thus ensuring that the newspaper is one that is reasonably calculated to provide notice to interested parties. Significantly, the evidence presented at the hearing does not show that the ICR is available at newsstands or other retail outlets within Salt Lake City. (App. Appx. 266). Instead, the evidence strongly implies that the ICR is a subscription-only newspaper. As a result, placing notice in the ICR did not meet the Bond Validation Act's requirement that notice be placed in a newspaper "published" within the municipality.

B. Alternatively, publication of notice in ICR and Utahlegals.com was not reasonably calculated to actually inform affected parties of the bond validation proceeding.

Even if the notice fulfilled the requirements of the Utah Bonding Act, the district court violated JRRN's due process rights because the notice was not the means most "reasonably calculated, under all the circumstances, to apprise the interested parties of the

pendency of the action to the extent reasonably possible or practical.” In this case, the City has provided no evidence for why notice by mail was neither reasonably possible nor practical under the circumstances. Nor has the City provided any explanation why publication in a newspaper with a large newsstand and subscription circulation, such as the Salt Lake Tribune or The Desret News, was not possible or practical under the circumstances. And while the City has claimed that publication on Utahlegals.com made up for any shortfalls in ICR’s circulation, no evidence was presented at the hearing regarding the size of the audience in Salt Lake City for notices on Utahlegals.com.

In addition, while other jurisdictions have found service by publication sufficient, those cases have always involved publication in a newspaper with a large circulation in the municipality issuing the bond. Thus, in Thomas v. Alabama Mun. Elec. Authority, 432 So.2d 470, 477 (Ala. 1983), the Supreme Court of Alabama upheld service by publication in the context of the State’s issuance of bonds. However, the Thomas court still held that “[t]he method of notice chosen must give reasonable assurance of actually giving notice in light of the other available means.” Id. (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950)). Accordingly, the court upheld service by publication because “[t]he Legislature could reasonably determine that notice by publication in newspapers published in the four largest cities of the State, was best calculated to apprise the large class of defendants of the commencement of these proceedings.” Id. Similarly, in this case, the district court could not obtain personal jurisdiction over JRRN by publishing the notice in just any newspaper in Salt Lake City.

Instead, the district court needed to choose the newspaper with the largest possible readership and audience in Salt Lake City. However, in finding that publication in the ICR fulfilled due process, the district court provided no basis for why that newspaper was the one most reasonably calculated to apprise interested parties in Salt Lake City of the validation proceeding. Indeed, given the alternative choices of the Deseret News and the Salt Lake Tribune, the selection of the ICR appears to have been arbitrary and capricious. Accordingly, publication in the ICR did not confer personal jurisdiction over JRRN.

Ironically, even the City concedes that the ICR does not have a greater readership in Salt Lake City than the Salt Lake Tribune and the Deseret News when it claims that articles about the hearing published in the Salt Lake Tribune and Deseret News were sufficient to satisfy due process. (Appellee Br. at 48). However, the articles in question merely stated that a hearing was to be held in the third district court on February 9, 2011. The articles did not provide the case number, did not provide any information regarding the City's Petition, and did not clearly notify citizens and taxpayers of their right to participate and argue their cases at the hearing. (App. Appx. 1036-1044.) And, most significantly, the articles were only published once. If an interested party did not read the newspaper on that particular day, she would never have seen the article. Just as problematically, the City appears to be arguing that service by publication can now occur through newspaper articles mentioning the existence of a lawsuit, without the need for any publication of formal notice. However, this Court cannot adopt such a position because it would not only eviscerate this Court's precedent regarding service by

publication, but also run afoul of the due process standards established by the United States Supreme Court. As a result, the publication of articles regarding the hearing in the Salt Lake Tribune and Deseret News cannot be the basis for conferring personal jurisdiction over JRRN.

Similarly, actual notice was not sufficient to confer personal jurisdiction under the circumstances of this case. Unless service has been waived, it is proper service of process, not actual notice, which confers personal jurisdiction. See e.g. Saysavanh v. Saysavanh, 2006 UT App 385, 145 P.3d 1166, ¶25 (Utah Ct. App. 2006) (“Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional, for it is service of process, not actual knowledge of the commencement of the action, which confers jurisdiction”). This is especially true in this case, where a party that does not appear at the hearing is barred from filing an appeal or bringing a collateral action. See Utah Code Ann. §§ 11-30-8, 11-30-10. If actual notice were sufficient to confer jurisdiction in a bond validation hearing, bond validation hearings would be effectively insulated from any challenge based on lack of notice. Parties who did not receive notice and therefore did not appear at the hearing would not only be barred from appealing the hearing based on lack of notice, they would be permanently enjoined from attacking personal jurisdiction through a collateral action. On the other hand, parties who received actual notice and appeared at the hearing to object and argue their case would be deemed to have waived their right to object. In short, deficiencies in notice and personal jurisdiction in bond validation hearings would effectively evade all appellate scrutiny. In

order to avoid such a possibility, this Court must hold that actual notice and appearing at the hearing does not result in waiver of any objections to notice and personal jurisdiction.

II. The City either violated the Bonding Act's requirement that it receive public input on the issuance of bonds or it never had standing to bring the bond validation action in the first place.

The City's bond issuance is invalid because the City failed to hold a public hearing prior to authorizing issuance of the bonds.³ The City does not and cannot dispute that it failed to hold any public hearings prior to authorizing the Initial Bond Resolution. Instead, it claims that the statutory requirement to hold a public hearing can still be satisfied if the City holds a hearing at any time prior to issuing the bonds. (Appellee Br. at 25). The City explains that this is because the City Council can choose not to issue a Final Bond Resolution based upon input from the public hearing. Id. at 25-26.

³ The City claims that JRRN has failed to preserve this issue. However, it was plain error for the district court to find the bond valid after holding that the City's failed to satisfy the public hearing requirement of Utah Code Ann. §11-14-318. See Meadow Valley Contrs., Inc. v. State DOT, 2011 UT 35, ¶ 17 (plain error exists where there is (i) an error; (ii) that should have been obvious to the trial court; and (iii) that is harmful). Furthermore, this issue was raised in JRRN's brief to the district court in which JRRN argued that the Initial Bond Resolution did not confer the City standing to pursue a bond validation action. (App. Appx. 1090-91). Specifically, JRRN argued that adoption of the initial bond resolution could not confer standing for a bond proceeding because the City had not yet held the required public hearing. Id. It was only after the district court held that the Initial Bond Resolution provided a sufficient basis for the bond validation proceeding that JRRN could raise the logical corollary – that holding the hearing after passage of the initial bond resolution failed to comply with the Bonding Act. It should also be noted that, because the validation proceeding does not provide for discovery and occurs over an extremely short time frame, a defendant at a validation hearing does not have the same time and preparation to raise and preserve arguments as a defendant in a normal court proceeding. Instead, the burden of discovering material errors and omissions in the bonding process rests primarily with the district court.

Presumably, under the City's argument, the City Council could also materially amend the terms of the final bond resolution based upon public input. Yet, at the same time, the City still maintains that the Initial Bond Resolution is sufficiently final to permit validation of the bond issuance. Id. at 25. Such an interpretation renders the Bond Validation Act and the requirement for a public hearing under the Bonding Act meaningless.

The purpose of the Bond Validation Act is to lend finality to the bond issuance process. Once a court has entered an order validating issuance of a bond, the bond and the process for issuing the bond are no longer subject to challenge. By claiming that the Initial Bond Resolution was sufficiently final to allow for bond validation, the City is arguing that it could have initiated a bond validation hearing and validated the bond issuance immediately after authorizing the Initial Bond Resolution but prior to holding the statutorily mandated public hearing. However, once the bond is validated, the City's issuance of the bond cannot be challenged even if the City never held the required public hearing. And, significantly, the City has adopted a position under which the City Council still has leeway, after validation of the bond, to not approve the Final Bond Resolution or materially change its terms. Even an amendment to the Final Bond Resolution that was clearly outside the City's discretion, such as increasing the amount of the bond or changing its purpose, would no longer be subject to challenge. In effect, the bond validation proceeding would become a "rubber stamp" to foreclose challenge to a final bond resolution while leaving the City unfettered discretion to disregard any remaining

procedural requirements or amend that final bond resolution in any manner whatsoever. As a result, the City's interpretation of the Bonding Act and the Bond Validation Act is simply untenable.

Either the Initial Bond Resolution is a final authorization of the bond that cannot be modified after the bond has been validated or the Initial Bond Resolution is a preliminary authorization that is subject to later modification and/or rejection. It cannot be both. If this Court finds that adoption of the Initial Bond Resolution constituted a final authorization for the bonds sufficient to invoke the Bond Validation Act, the City's failure to hold the statutorily mandated public hearing prior to adopting the Initial Bond Resolution is fatal to validation of the bonds. On the other hand, if the Court finds that the Initial Bond Resolution is only a preliminary authorization and the terms for issuance of the bonds are subject to modification at any time prior to adoption of the Final Bond Resolution, it must hold that the Initial Bond Resolution cannot be the basis for a bond validation action.⁴

Despite the lack of any evidence supporting its finding, the district court held that the adoption of an initial bond resolution followed by a final bond resolution after the bond validation was customary practice and practically necessary. (App. Appx. 1605-06). This may be the case if and when a municipality has completed all of the statutorily mandated procedures and hearings prior to adoption of the initial bond resolution, and the

⁴ Pursuant to Utah Code Ann. §11-30-3, a petition to establish the validity of bonds may only be filed "after [the public body] has authorized the issuance of bonds ... but before the issuance and delivery of any such bonds." Utah Code Ann. §11-30-3(1).

initial bond resolution includes terms that fully and completely eliminate the City Council's ability to adopt a materially different final bond resolution. That is not the case here. Instead, by its own terms, the Initial Bond Resolution in this case does not fully authorize the issuance of the Bond. Furthermore, the Initial Bond Resolution notes that all of the proceedings necessary for authorization of the Bond have not yet been completed, including the requirement for a public hearing under Utah Code Ann. §11-14-318. As a result, the City's failure to hold a public hearing prior to adopting the Initial Bond Resolution appears to have created a unique circumstance.

Furthermore, the City has failed to provide any evidence or argument that it actually held the statutorily mandated public hearing. The district court expressly refused to find that the City's March 2010 hearing constituted the "hearing required by Utah Code section 11-14-318." (App. Appx. 1536.) Nor did it hold that the December 2010 hearing fulfilled the statutory mandate for a public hearing. Instead, the district court only found that notice for these meetings was adequate. As a result, while the City argues that notice for the March 2010 and December 2010 meetings was proper, it makes only a cursory reference to whether the meetings themselves complied with Utah Code Ann. §11-14-318. (Appellee Br. at 26). In fact, the City concedes that the December meeting was conducted in exactly the same manner as the March hearing that did not satisfy the hearing requirement of Utah Code Ann. § 11-14-318. Id. at 17. The City now claims that, even if the March and December hearings did not meet the statutory requirements, public comments taken during "the Comments to the City Council period"

prior to passage of the Final Bond Resolution are sufficient to satisfy the public input requirement of Utah Code Ann. §11-14-318. (Appellee Br. at 28 n.11). However, even if public comments could supplant a statutorily required hearing, comments taken after the bond has been validated should never be able to meet the public input requirements of the Bonding Act. As a result, the district court's order must be vacated because there was no finding that the City had complied with the public hearing requirement of Utah Code Ann. §11-14-318.

III. The district court erred in holding that the City had discretion to issue bonds to fund a project that is barely half the scope of what voters were told they were funding.

The district court erred in holding that the City had discretion to issue bonds for a project that is materially different from the one approved by voters.⁵ While a municipality has discretion to change the scope of a project for which bonds are issued, this discretion is not unfettered. In this case, by choosing to pursue a project that is barely half the scope of what voters were promised, the City has exceeded the bounds of its discretion. The City has not disputed, nor can it, that the scope of the project has

⁵ The City has argued that this issue is a question of fact and that the Court may affirm the findings below because JRRN has failed to marshal the evidence. However, the case cited in support of the City's proposed standard of review, Bluffdale Mountain Homes, LC. v. Bluffdale City, 2007 UT 57, ¶46 (Utah 2007), only applies to determinations of viability under a statute allowing property owners to disconnect their property from a city. It has nothing to do with the issues or the standards of review applicable in this case. Instead, this Court has treated previous cases challenging bond issuances as raising questions of law. See Gardner v. Davis County, 523 P.2d 865 (Utah 1974); Ricker v. Board of Educ. of Millard County School Dist., 396 P.2d 416 (Utah 1964).

changed significantly from the project proposed in the Voter Information Pamphlet. Instead, the City has claimed that this Court should not consider the Voter Information Pamphlet and that the City still acts within its discretion as long as the purpose of the project remains the same. (Appellee Br. at 29-31). Both of these arguments fail.

First, it is appropriate for the Court to consider the Voter Information Pamphlet. In Ricker, this Court considered information outside of the ballot language on the assumption that “the public reasonably could and did regard the [collateral statements or explanatory material] as to the various school needs as part of the notice of the election.” 396 P.2 at 419. The Ricker court considered this extraneous material despite the trial court’s express finding that the representations in the election brochure were not intended to mislead or deceive. 396 P.2d at 419. Similarly, in this case, the Voter Information Pamphlet and the Salt Lake Tribune article describing the project were published contemporaneously with the election notice. Indeed, the City has admitted that “it intended for citizens to rely on its representations in the Voter Information Pamphlet.” (Hr’g Tr. at 21). And the City itself has claimed that articles in the Salt Lake Tribune are as effective as publication of legal notice. (Appellee Br. at 48). As a result, it is both appropriate and necessary that this Court consider the Voter Information Pamphlet in determining the scope of the project that voters approved.

Second, the City does not have unlimited discretion to change the scope of a project as long as it maintains the same general “purpose.” Once a municipality has represented the details of a project as well as its general purpose, its discretion is

constrained by those details. While the cases cited by the City grant a municipality considerable discretion, none stand for the proposition that this discretion is unlimited as long as the general purpose presented to the voters is upheld. In Ricker, a school district represented to voters that the purpose of the bond was to construct and remodel school buildings. 396 P.2d at 419. As detailed in the accompanying election brochure, the bond proceeds were to be used to construct a new combined junior and senior high school in Delta, build a new farm shop and remodel another high school in Fillmore, and all remaining funds used to generally remodel elementary schools. Id. The bond was challenged when the school district revealed that, due to cost increases, it would not be able to direct as much money towards the elementary school remodeling projects as initially represented. Id. However, construction of the new high school in Delta, the farm shop and remodel for the high school in Fillmore, and remodeling of the elementary schools would still proceed. Id. Under those circumstances, this Court held that the school district acted within its discretion in choosing how to allocate moneys between each specific project. Id. at 419-20. However, Ricker did not grant the school district unlimited discretion as long as it used the bond funds to construct or remodel schools. For example, the Court never considered whether the school district had discretion to use the bond funds to build an elementary school in Nephi instead of the promised high schools in Delta and Fillmore. As a result, while Ricker is instructive regarding when a bond issuer acts within its discretion, it fails to address the limits of that discretion.

Similarly, the Gardner case also fails to address the limits of discretion. Gardner notes that, due to changed circumstances, it is no longer viable to pursue a project that fulfills the representations made to the voters. When that situation occurs, the municipality has the discretion to abandon the project and use any related funds to retire the bonds. 523 P.2d 865. Specifically, in Gardner, Davis County had issued bonds in order to construct hospital facilities. Id. However, necessary federal funding could not be obtained and the project was no longer viable. Id. Under those circumstances, this Court held that the county had discretion to abandon the project, retire the bond, and give the citizens their money back. Id. at 867-68. Again, the Court did not grant unfettered discretion by, for example, holding that the county had the discretion to deal with the lack of funding by building a small medical clinic rather than the promised hospitals.

And, contrary to the City's claims, other jurisdictions that have considered the issue have found that a municipality's discretion is limited when it chooses to make detailed representations regarding a project. See e.g. Devorsky v. La Vega Ind. Sch. Dist., 635 S.W. 2d 904 (Tex. Ct. App. 1982); State ex rel. Traeger v. Carleton, 64 N.W.2d 776, 778 (Minn. 1954); O'Farrell v. Sonoma County, 208 P. 117 (Cal. 1922). The City has attempted to distinguish the earlier decisions by claiming that they involved ballot language that was more specific than the ballot language used in this case. But this case is no different once the City's detailed representations in the Voter Election Pamphlet and other extraneous material are taken into consideration. Furthermore, the City attempts to distinguish Devorsky by claiming that it was overruled and involved

intentional misrepresentations by the school district. In reality, Texas did not “overrule Devorsky and refuse[] to consider representations outside of the official orders and resolutions.” (Appellee Br. at 35). Instead, Texas later held that “a political subdivision cannot be bound by the representations of individual council members or the City staff.” Taxpayers for Sensible Priorities v. City of Dallas, 79 S.W.3d 670, 675 (Tex.App. 2002). Nor did Devorsky involve intentional misrepresentations. (Appellee Br. at 34). Instead, as in this case, the municipality “knew that all of the voters would rely upon these representations, knew that the representations were material to the election, and knew and intended that the representations would induce voters to vote for rather than against the bond issue” and, after the ballot initiative had been approved, chose not follow through on those representations. Devorsky, 635 S.W. 2d at 908. There was no allegation in Devorsky that the municipality had intended to renege on the representations at the time they were made. Id. As a result, the similarity of Devorsky to the facts of this case remains striking.

In summary, this case raises a matter of first impression in Utah – the bounds of a municipality’s discretion in implementing a project that has been detailed to the voters. The City has claimed that it has unlimited discretion as long as the ultimate project conforms to the same general purpose promised to the voters. Such an interpretation of municipal discretion cannot be correct. Under the City’s view, the City would still act within its discretion if it built a multi-million dollar state-of-the-art 5-acre playground and skateboard park rather than the 220-acre sports complex promised to tax payers – even

though the playground clearly does not fulfill the representations of the Voter Information Pamphlet, it would still fall within the same “general purpose.” As a matter of public policy, the unfettered discretion that the City seeks is ripe for abuse and offends justice and equity. See Ricker, 396 P.2d 420. The City’s conduct here falls outside of the bounds of the City’s discretion because the project is significantly and materially different from what voters were promised. As a result, the bond issuance cannot be validated and the district court’s order must be vacated.

IV. The district court erred in holding that the City’s authorization of the bond did not violate Utah Code Ann. §10-9a-406.

The district court erroneously dismissed JRRN’s argument that the adoption of the Initial Bond Resolution violated Utah Code Ann. §10-9a-406, which prohibits authorization of a publicly owned structure until and unless it conforms to the City’s general plan. Here, the location of the project has been approved and is not subject to debate or later change. Furthermore, the City does not dispute that the Initial Bond Resolution authorizes funding for the project and that has even characterized adoption of the Initial Bond Resolution as having “approved the final deal.” (App. Appx. 1746.) Instead, the City attempts to distinguish authorization of funding for the project from authorization for the project itself. (Appellee Br. at 35). Such a distinction rings hollow. There is no single isolated step under which a municipality authorizes a publicly owned structure. Instead, a municipality provides authorization through multiple parallel processes. Providing funding for the construction of the structure, when its location has

already been decided, is one form of such authorization. As a result, adoption of the Initial Bond Resolution resulted, at the very least, in authorization of some aspects of the project. However, because the district court summarily dismissed this issue as irrelevant, it never entered any findings of facts or conclusions of law on whether the project authorized by the Initial Bond resolution complied with the City's general plan. Accordingly, this issue should be remanded to the district court to make appropriate findings of fact and conclusions of law.

CONCLUSION

The Bonding Act and the Bond Validation Act contain both procedural and substantive safeguards to prevent taxpayers from being levied for a project that they did not approve. In this case, not only have these safeguards have been violated, but the City has advocated an interpretation of the bonding acts that would allow these safeguards to be circumvented in the future with impunity. This should not be permitted.

First, the district court violated the Bond Validation Act and due process when it did not mail notice and chose to publish notice of the bond validation proceeding in the Intermountain Commercial Record rather than the Deseret News or the Salt Lake Tribune. The City has argued that notice is not constitutionally required and that technically fulfilling the notice requirements of the bonding act is sufficient, even if the notice is not reasonably intended to and does not, in fact, apprise all interested parties of the action. As a matter of public policy, this cannot be correct. This Court should

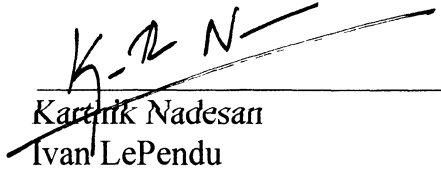
therefore vacate the district court's order and remand for a new bond validation proceeding after notice has been properly served.

Second, the City failed to hold the statutorily mandated public hearing prior to adopting the Initial Bond Resolution. Moreover, the district court failed to find that the City's hearings satisfied the public hearing requirement of the Bonding Act. The City has argued that the public hearings can be held at any time prior to issuance of the bond, including after the bond issuance has been validated. It has even argued that public comments, rather than a hearing, are sufficient to meet the public hearing requirement. However, allowing a municipality to fulfill requirements of the bonding act after validation of the bond issuance eviscerates the procedural requirements of the Bonding Act. Because City's failed to fulfill the procedural requirements of the Bonding Act, this Court should vacate the district court's order.

Third, the City has exceeded the bounds of its discretion by seeking to use bond funds for a materially different project from the one that voters were told they were authorizing in 2003. The City has argued that it is not bound by its detailed representations and has unlimited discretion as long as the project conforms to the "general purpose" of the ballot initiative. This position deprives voters of any assurance that the bonds they approve will be spent on the project that they were promised. Here, the voters were promised a project that was almost twice the size of what the City now proposes. As a result, the Court should find that the City exceeded its discretion and vacate the district court's order.

DATED this 11th day of October, 2011.

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CERTIFICATE OF SERVICE

This is to certify that on the 11th day of October, 2011, two true and correct copies of the Reply Brief of JRRN Appellants was served on the following via U.S. Mail:

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